DOCUMENT RESUME

ED 118 472 SO 008 839

AUTHOR Lindmark, Joyce A.
TITLE Identifying and Controlling the Effects of Biases in Criminal Trials by Jury.
PUB DATE Dec 75
NOTE 12p.; Paper prepared for annual meeting of Speech Communication Association (Houston, Texas, December 1975)

EDRS PRICE MF-$0.83 HC-$1.67 Plus Postage
DESCRIPTORS *Bias; *Court Litigation; Court Role; Courts; *Criminal Law; *Discriminatory Attitudes (Social); Due Process; *Equal Protection; Justice; Laws; Lawyers; Legal Problems; Speeches

ABSTRACT

Three changes in trial procedure are proposed to minimize the effects of individual juror bias and those biases that are artifically induced by lawyers. Since certain personality types are likely to maintain whatever prejudices they bring to court, no one should be exempted from jury duty unless he is mentally retarded or physically incapacitated in a way that makes jury service impossible. This would not eliminate juror bias but would broaden the venire in order to more accurately reflect the biases of the total community. Second, since most jurors have a verdict in mind before they leave the jury box, unanimous verdicts should be eliminated. This would decrease the effect of individual biases of either the majority or minority in jury deliberations. Third, lawyer-derived biases may be eliminated by doing away with both cause and peremptory challenges. Too often lawyers use jury selection as means to seat jurors who have biases favorable to their side of the case. Also, in many cases, prospective jurors learn to give the "right" answer, glossing over their actual feelings. (Author/DE)

****
* Documents acquired by ERIC include many informal unpublished *
* materials not available from other sources. ERIC makes every effort *
* to obtain the best copy available. Nevertheless, items of marginal *
* reproducibility are often encountered and this affects the quality *
* of the microfiche and hardcopy reproductions ERIC makes available *
* via the ERIC Document Reproduction Service (EDRS). EDRS is not *
* responsible for the quality of the original document. Reproductions *
* supplied by EDRS are the best that can be made from the original. *
****

ED118472

JOYCE A. LINDMARK

U S DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION
THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

Identifying and Controlling the Effects of Biases in Criminal Trials by Jury

It is comforting to believe that each criminal defendant in this country gets a "fair trial," a proceeding in which a jury presumes him innocent unless he is proven guilty beyond a reasonable doubt. Unfortunately,

> . . the several philosophical-legal tenets that underlie the juridical ideal of the 'fair trial'--. . .the impartial juror, the representative panel, and the challenge method--are filled with ambiguities and at war with one another.[1]

Support for Professor Robert Blauner's conclusion exists in the research being conducted on the transmission of information by participants in a trial--most frequently, the attorneys--and the receipt of information by members of the jury. The underlying pattern of this research suggests that juror biases are so pervasive and varied that a fair trial, as commonly defined, is presently a legal fiction. At the same time, lawyers not only capitalize on these biases but often seek to create additional ones through the tactics that they employ. Consequently, minimizing the injustices which result from the combined biases warrants structural changes in the conduct of criminal trials.

Experimental data confirm the notion that certain personality types are likely to maintain whatever prejudices they bring to court, regardless of the evidence and testimony which is presented to them. Janis found that certain established personalities are relatively uninfluenced by persuasion of any kind.[2] Among them are individuals who display social withdrawal tendencies; individuals who are constricted in their ability to respond empathically to varied stimuli; and those who are compelled to transfer deep-seated hostilities to elements in their environment.

Extrapolating from an attitude survey by Rokeach and Vidmar, it seems likely that jurors favoring the death penalty constitute another personality group which will bring assorted other biases into the courtroom. Such jurors are more authoritarian, dogmatic, and punitive than those against capital punishment;[3] hence the likelihood that they, too, will not surrender prejudices easily.

A third group of jurors emotionally programmed for biased responses is composed of members of racial minority groups. Such individuals often have a "systemic" bias, believing that law and the judicial system which incorporates it are inherently punitive, not helpful.[4] Accordingly, such jurors may be disinterested in listening objectively to the case of the prosecutor or the defense, preferring to make arbitrary and capricious decisions about the fate of a defendant.

As to specific sources and effects of juror biases, there are as many as there are researchers to study them. For one, considerable evidence exists which identifies the authoritarian personality as a major source of bias in a juror. Legant found that even though all of her experimental jurors saw the same, video-taped, simulated trial, those jurors who scored high on a measure of authoritarianism liked the defendant in the case significantly less and suggested a significantly longer sentence for him than did jurors who scored low. Equally revealing was the result that "high authoritarians" attributed responsibility to an accused against whom there was little or ambiguous evidence more often than did "low authoritarians."[5] Results of Legant's work correlate with Boehm's earlier findings that both authoritarians and anti-authoritarians tend to distort evidence which is presented to them.[6]

The comparative status of the defendant and juror also biases jury verdicts. Snyder's study compared decisions of members of all male juries with those of mixed juries and found that "inferior status" litigants' chances of winning are increased when confronting a male-female jury and decreased when facing a male jury. In addition, jury members regarded as having superior status (white, adult males, with positions in business) favored inferior status litigants, and vice versa.[7]

The social and political attitudes of jurors are a third area of potential bias, particularly in "political" trials. During the trial of the "Harrisburg Seven," Jay Schulman and his associates discovered that affiliation with certain "traditionary" religions, a high level of education, and high media exposure in a prospective juror would probably result in a vote against defendants associated with a liberal position on social and political issues.[8] In attempting to impanel a jury for the trial of Huey P. Newton, Charles Garry revealed an endemic racism in the white suburbanites who were to dominate the Newton jury.[9] Rokeach and Vidmar, when testifying at a murder trial in 1971, identified additional sources and effects of bias within potential juror populations. Strong anti-black attitudes frequently exist in older, poorer, less educated whi[illegible] who are regular church goers and probably not single.[10] Poo[illegible] fendants will often fare poorly among jurors of very high income or education, with males being more "anti-poor" than females.[11] And results from simulated jury deliberations, derived independently by two sets of researchers, suggest that perceived belief and attitude dissimilarity between a defendant and a juror is an even stronger determinant of discrimination and rejection than is race; and such dissimilarity results in the dispensation of more severe

verdicts.[12] In addition, Mitchell and Byrne, one of the teams of investigators, demonstrated that in the high authoritarian, these propensities are even stronger.[13]

The role call of biases could continue, but it would not alter the obvious conclusion that an individual's personality structure, values, and attitudes are going to bias him in one direction or another and to one extent or another. Any proposal, however, which attempts to minimize the effects of individual juror bias should also control the biases deliberately created by lawyers during the voir dire proceedings, since biases garnered here affect the ultimate outcome of a trial. As Professor Blauner has observed,

> Despite its theoretical function /to guarantee a neutral, objective, and relatively unbiased jury/, the voir dire is in reality a contest between the two adversaries toward the goal of selecting the jury which is most favorable to his side.[14]

One technique for constituting such a jury is the long and excessively detailed voir dire. Through such an examination, a lawyer can arouse prejudices, develop false issues which are tangential to his case, and use appropriate repetitions or omissions to emphasize certain evidence or to derogate it.[15]

A second, more specific attempt to bias a jury uses the voir dire to argue the attorney's case. Broeder revealed that

> after observation of a series of twenty-three consecutively tried jury trial cases held in a midwestern federal district court over an eighteen month period, one researcher concluded that the voir dire is more effectively used as a forum for indoctrination than as a screening mechanism[16]

Similar findings were reported by Saul Mendlowitz in Delay in the Courts. In making a content analysis of voir dire exchanges, he found that attorneys spent over one half the time at their voir dire preparing the jury for the case to be presented, instead of

asking questions which pertained to the jurors' qualifications.[17]

A third and uncontrollable perversion of voir dire occurs when an attorney deliberately selects "weak-minded" jurors.[18] Such selection is most likely to occur when a prosecutor knows he has a weak indictment or a defense attorney believes his client guilty. In such cases, the theoretically desirable, objective juror becomes an anathema. Instead, the "man of the hour" is easily swayed by sympathetic appeals;[19] or is filled with low self-esteem and feelings of personal inadequacy, thus being highly persuasible;[20] or seems shady enough himself to be able to identify with a weasely defendant.[21] Generally, then, lawyers use voir dire to line up prejudices as bast they can in favor of their clients.

Three charges in trial procedure would minimize the effects of individual juror bias and eliminate those biases which are artificially induced by lawyers, thus actualizing the ideal of the fair trial. First, no one should be exempted from jury duty unless he is mentally retarded or physically incapacitated in a way which would make jury service impossible. Occupational exemptions, for one, tend to mitigate against thoughtful jury decisions.

> Exemption is given to some professional people who would seem to be best qualified to serve. . .The subtraction of relatively intelligent classes means that it is an understatement to describe a jury. . .as a group of twelve people of average ignorance. There is no guarantee that members of a particular jury may not be quite unusually ignorant, credulous. . .narrow-minded, or biased.[22]

Other unwarranted exclusions from jury panels result through the challenge for cause, if a potential juror says he has an unchangeable opinion about a case, or the peremptory challenge, if he holds any opinions about the forthcoming case. The futility of such disqualification was expressed by attorney Zeisler:

> . . .the rule which disqualifies persons who have formed or expressed an opinion based on information other than the original evidence is, in these times of rapid dissemination of news, an absurd anachronism. . .It furnishes an easy method to escape jury duty; it invites fraud and perjury.[23]

Although Zeisler made his statement eighty years ago, a similar point of view was expressed more recently by Professor Blauner, in reference to the Huey Newton trial:

> A juror without significant bias. . .is. . .almost non-existent. Further, such a state of mind might not even be desirable--/it is suggestive of/ a person of apathy, ignorance, even stupidity, or at least someone who is not living in today's social world.[24]

Reducing the categories of ineligible jurors would not eliminate juror biases, nor is it meant to. Historically, a jury was intended to reflect the morals, values, and prejudices of a community. But eliminating exemptions broadens the venire; juries would more accurately reflect the biases of the total community. Rokeach and Vidmar attest to the desirability of this goal in maintaining that

> . . .the best way of coming closer to the ideal of an impartial jury would be a selection procedure in which the biases of various segments of the population have an equal chance of being represented; thus cancelling one another to a greater extent than is presently the case.[25]

If community biases still were inadequately represented, larger juries could be constituted to produce a more statistically reflective sample. Using an appropriately broad, legally constituted, geographical unit, such as a county, should also diversify and thus minimize, the effects of any single bias on a given jury.

Presumably, most citizens, complete with biases, are now eligible for jury service. A second change in trial procedure necessarily follows: verdicts in criminal cases must be replaced by a two thirds or simple majority vote of guilt or innocence.

Legal precedent for such a change is already evolving. Johnson v. Louisiana, a 1972 case, has ruled that a unanimous verdict of guilt is not a due process requirement in state criminal cases.[26] Although Johnson v. Louisiana does not address itself to non-unanimous verdicts of acquittal, the logic of such a total change is inescapable. At the outset of the criminal trial process, a grand jury determines whether a man will face an indictment and be placed in jeopardy. Even so, it is not required to reach a unanimous verdict. Why, then, should a petit jury, composed of people with similar biases and inexpertise, be expected to display greater certainty and omniscience? As for the actual process of deliberation within the jury room, a majority vote has more validity than a unanimous verdict. To begin, most jurors apparently have a verdict in mind before leaving the jury box.[27] Therefore, unless they all leave with the same opinion, one of three things will happen. The majority will convince the minority to change its opinion through intimidation, exhaustion, or fear of censure. Or, the minority will engage in an endurance contest with the original majority, perhaps achieving a change in vote, although not necessarily a real change in the opinion of the majority. Or, a hung jury will result if the members of the minority or the majority are equally non-persuasible. In the first two instances, a unanimous verdict would be a fraud; in the last situation, it becomes a meaningless requirement.

While the preceding two changes neutralize the effects of juror biases, a final trial procedure must be modified to eliminate lawyer-derived biases. Challenges for cause and peremptory challenges both should be eliminated. In effect, lawyers would no longer conduct a voir dire but would concentrate exclusively on the presentation of a case to the jury. Drastic as this

suggestion may sound, there is some legal precedent and logical justification for it. As early as 1919, the United States Supreme Court concluded that there is nothing in the Constitution that requires the granting of peremptory challenges.[28] As to challenges for cause, voir dire questions don't always work; that is, they don't always keep the "bad guys" off of a jury. In commenting on the Newton case, Ann Fagan Ginger noted that ". . .many prospective jurors had learned to give the 'right' answer, glossing over some of their actual feelings."[29] The Harrisburg Seven trial offered more dramatic evidence that even the most thorough voir dire and field investigations of prospective jurors can be countered. Paul Cowan, journalist who interviewed seven jurors after the trial, found that the two jurors who were holdouts had either lied or deliberately misled attorneys with their responses.[30] Next, even when biases are revealed, it is often difficult to separate an individual's preconceptions from his ability to act in a detached manner. The presence of biases does not necessarily make a person unfit for "fair" decisionmaking in various kinds of trials. Too, interrogation about biases may be counter-productive. Dr. Bernard Diamond, forensic psychiatrist, examines such a possibility when he says

> . . .the person who denies racist attitudes and says, 'No, I will be fair,' may actually be less likely to be fair than the person who says 'Yes, I do have prejudices,' because such a person can consciously cope with his prejudiced attitudes, make allowances for them, and negate them in his own mind. And so I'd say, at best, the questioning is not very revealing of a person's true attitudes and, at worst, it may inadvertently result in the selection of prejudiced jurors.[31]

Ironically, minimizing jury biases in one sense can be achieved by emphasizing them in a different contest. If the venire is broadened and unanimous verdicts eliminated, an individual

juror's biases become less important. Simultaneously, the biases of a total community at a particular time are more accurately and completely reflected. This is as it should be, since "society itself initiates [a] case through its agents, and the jury may. . . be looked upon as society reviewing the work of those agents."[32] Indeed, the very law the jury implements is little more than the codification of the biases of the majority of a community at any particular time. As Holmes put it, for better or for worse,

> it is perfectly proper to regard the law simply as a great anthropological document. . .; as an exercise in the morphology and transformation of human ideas. . . who could fail to be interested in the transition through the priest's test of truth,--the miracle of the ordeal--and the soldier's--the battle of the duel--to the democratic verdict of the jury![33]

Notes on Sources

[1] Robert Blauner, writing in Minimizing Racism in Jury Trials, ed. by Ann Fagan Ginger (Berkeley, California: National Lawyers Guild, 1969), p. 69.

[2] Irving Janis, writing in Communication and Persuasion, ed. by Carl I. Hovland, Irving Janis, and H. H. Kelley (New Haven: Yale University Press, 1953), p. 57.

[3] M. Rokeach and N. Vidmar, "Testimony Concerning Possible Jury Bias in a Black Panther Murder Trial," Journal of Applied Social Psychology, III (January-March, 1973), 22.

[4] Albert S. Osborn, The Mind of the Juror (Albany, New York: The Boyd Printing Co., 1937), Chapter XVII, "Prejudice."

[5] P. Legant, "The Deserving Victim: Effects of Length of Pretrial Detention, Crime Severity, and Juror Attitudes on Simulated Jury Decisions," unpublished doctoral dissertation, quoted in "Towards Principles of Jury Equity," Yale Law Journal, 83 (April, 1974), 1042.

[6] Virginia Boehm, "Mr. Prejudice, Miss Sympathy, and the Authoritarian Personality: An Application of Psychological Measuring Techniques to the Problem of Jury Bias," Wisconsin Law Review, 1968 (1968), 745.

[7] Eloise C. Snyder, "Sex Role Differential and Juror Decisions," Sociology and Social Research, 50 (July, 1971), 445.

[8] Jay Schulman, et. al., "Recipe for a Jury," Psychology Today, May, 1973, p. 40.

[9] Charles Garry, Minimizing Racism in Jury Trials.

[10] Rokeach and Vidmar, op. cit., pp. 21-22.

[11] Ibid., p. 22.

[12] Ibid., p. 22.

[13] Herman E. Mitchell and Donn Byrne, "The Defendant's Dilemma: Effects of Jurors' Attitudes and Authoritarianism on Judicial Decisions," Journal of Personality and Social Psychology, 25 (1973), 126.

[14] Blauner, op. cit., p. 48.

[15] Osborn, op. cit., p. 32.

[16] Dale W. Broder, "Voir Dire Examinations: An Empirical Study," Southern California Law Review, 38 (1965), 528.

[17] Saul Mendlowitz, n. 9, in Harry Kalven and Hans Zeisel, Delay in the Courts (Chicago: University of Chicago Press, 1959), p. 103.

[18] Osborn, op. cit., p. 32.

[19] Ibid.

[20] Janis, op. cit., p. 57.

[21] Osborn, op. cit., p. 32.

[22] G. Williams, The Proof of Guilt (London: Stevens and Sons, 1963), pp. 271-272.

[23] L. Zeisler, writing in Echoes of the Sunset Club, compiled by W.W. Catlin (Chicago: Howard Bartels and Co.m 1891), p. 211.

[24] Blauner, op. cit., p. 69.

[25] Rokeach and Vidmar, op. cit., p. 24.

[26] Johnson v. Louisiana, 406 U.S. 356, 360 (1972).

[27] Harry Kalven, "Advocacy and the Jury System: The Impact of the Trial Lawyer," Federal Rules Decisions, 44 (May, 1968), 170; 172.

[28] Stilson v. U.S., 250 U.S. 583, 586 (1919).

[29] Ann Fagan Ginger, Minimizing Racism in Jury Trials, p. 51.

[30] Paul Cowan, "Recipe for a Jury," p. 40.

[31] Bernard Diamond, Minimizing Racism in Jury Trials, p. 217.

[32] Ralph K. Winter, "The Jury and the Risk of Non-persuasion," Law and Society Review, V (February, 1971), 341.

[33] Oliver Wendell Holmes, Jr., "Law in Science and Science in Law," in Law and Resistance, ed. by Laurence Veysey (New York: Harper and Row, 1970), p. 131.